If the Court of Appeals desires logically to apply the principle of the *Waters* case, the instant case should be reversed on appeal. But note must be taken of the suggestion in the *Waters* case that that decision may be limited to its facts.

MORTGAGES—MARSHALLING—WARRANTIES.—Where land subject to a mortgage is conveyed with a specific warranty against incumbrances, and the grantee subsequently reconveys part to the mortgagor, *held,* the grantee has an equitable right to have the part reconveyed sold first in satisfaction of the mortgage. *Barry* v. *Boomer* (N. C. 1920) 103 S. E. 914.

Where a mortgagor alienates the mortgaged land to one who personally assumes the mortgage debt, the land purchased becomes the primary fund for such payment, even though part of the land only is conveyed. *Bowne* v. *Lynde* (1883) 91 N. Y. 93. In such a case, if the grantee makes several further conveyances in parcels, at different times, upon foreclosure the land must be sold in the inverse order of alienation, after exhausting the land retained by the mortgagor's grantee. This is true notwithstanding that part of the property was reconveyed to the mortgagor. *Hopkins* v. *Wolley* (1880) 81 N. Y. 77. But where a portion of the mortgaged land is alienated by the mortgagor with a specific warranty against incumbrances, the grantee's land is only secondarily liable, and the mortgagor's property must be applied first in payment of his own debt. See *Howard* v. *Robbins* (1902) 170 N. Y. 498, 503, 63 N. E. 530. If the mortgagor conveys all the land with such a covenant, and part is reconveyed to him, it is only equitable that, as between the mortgagor who is personally liable, and the grantee who holds under a warranty, the former should be the first to suffer. So in the instant case the court was undoubtedly correct in holding the land in the mortgagor's possession subject to a sale in foreclosure before looking to the grantee's land.

MORTGAGES—PURCHASE OF EQUITY OF REDEMPTION—CLOGS.—In 1840, the plaintiff's father executed a mortgage to the defendants, conditioned that if the loan were not returned in twenty years, the defendants should become owners of one moiety of the mortgaged premises and the other moiety should be returned unencumbered to the mortgagor. In 1864, four years after default in payment, the plaintiffs executed a deed whereby "they took back one half of the lands and conveyed the other half to the defendants". The plaintiffs now bring a bill in equity to redeem. *Held,* since the execution of the deed was an independent and voluntary transaction, it will be upheld. *Shankar Dhonddev* v. *Yeshwant Raghunath Gaitonde* (1920) 22 Bombay Law Rep. 965.

Equity will not enforce any provision in a mortgage which attempts to extinguish the equity of redemption. *Jackson* v. *Lynch* (1889) 129 Ill. 72, 21 N. E. 580, 22 N. E. 246; *Clark* v. *Henry* (N. Y. 1823) 2 Cow. 324; (1912) 12 Columbia Law Rev. 627. But by a fresh transaction, the mortgagee may purchase the equity of redemption. *Green* v. *Butler* (1864) 26 Cal. 595; (1913) 13 Columbia Law Rev. 170. Such a bargain is carefully scrutinized by equity. See *Odell* v. *Montross* (1877) 68 N. Y. 499, 504. It will be sustained if *bona fide* and for an adequate consideration. *Trull* v. *Skinner* (1835) 34 Mass. 213. Otherwise it will not defeat the right to redeem. See *Young* v. *Miner* (1910) 141 Wis. 501, 124 N. W. 660. A deed absolute in terms but

given as security for a loan is treated as a mortgage. *Kraemer* v. *Adelsberger* (1890) 122 N. Y. 467, 25 N. E. 859; *Odell* v. *Montross, supra.* An unfair sale which is in fact a loan transaction is similarly construed. *Noble* v. *Graham* (1903) 140 Ala. 413, 37 So. 230. For example, where the value of mortgaged property was between $2,000 and $3,000, an absolute transfer by an embarrassed mortgagor for considerations aggregating $900, does not extinguish the right to redeem. See *Young* v. *Miner, supra.* But where a gift of the mortgaged premises to the mortgagee was voluntary and no part of the consideration for the mortgage loan, it was upheld even though the transaction was concurrent with the execution of the mortgage. *Newcomb* v. *Bonham* (1684) 1 Vern. 7, 214, 231; *Gleason's Adm'x.* v. *Burke* (1869) 20 N. J. Eq. 300. In each case, the independence, *bona fides,* and fairness of the transaction are questions of fact. In the instant case, the circumstance that the subsequent deed exactly followed the terms of defeasance leads to a strong inference that the transaction was in pursuance of the original mortgage agreement. But the court has reached a contrary conclusion of fact. Upon this finding, the decision is undoubtedly correct.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BAILEE.—A loaned his automobile to B. While driven by B, the automobile collided with the defendant's street car. The negligence of the bailee and of the defendant concurred in causing the collision. In an action by A to recover for damages to the automobile, it was *held,* the defendant is liable. *Fisher* v. *International Ry.* (Sup. Ct. Special Term, 1920) 182 N. Y. Supp. 313.

By the weight of authority, the contributory negligence of a mere bailee does not prevent a recovery by the bailor against one who has negligently injured the subject of the bailment. *Lloyd* v. *Northern Pac. Ry.* (Wash. 1919) 181 Pac. 29; *Spelman* v. *Delano* (1914) 177 Mo. App. 28, 163 S. W. 300; *Gibson* v. *Bessemer & Lake Erie Ry.* (1910) 226 Pa. 198, 75 Atl. 194; *New York, etc. Ry.* v. *New Jersey El. Ry.* (1897) 60 N. J. L. 338, 38 Atl. 828. But some courts declare that the bailee's contributory negligence may be "imputed" to the bailor, thus precluding recovery by the latter. *Illinois Central Ry.* v. *Sims* (1899) 77 Miss. 325, 27 So. 527; *Puterbaugh* v. *Reasor* (1859) 9 Oh. St. 484; see *T. & P. Ry.* v. *Tankersley* (1885) 63 Tex. 57; *Welty* v. *Indianapolis, etc. Ry.* (1885) 105 Ind. 55, 4 N. E. 410. This minority doctrine is the older. Thompson, Negligence (2nd ed. 1901) § 499. But the soundness of it is questionable. A bailor is not liable for injuries caused by the bailee's negligent use of the article bailed. *Van Blaricom* v. *Dodgson* (1917) 220 N. Y. 111, 115 N. E. 443; *Herlihy* v. *Smith* (1874) 116 Mass. 265. Certainly the power of the bailee to subject the bailor to liability for his negligence toward a third person is not increased by the fact that such third person was himself negligent; nor is the power affected by the fact that the bailor is suing instead of being sued. The instant case in following the weight of authority seems to have adopted the better view. Both the bailee and the defendant concurred in causing a negligent injury to the plaintiff's property. As joint tort-feasors, each is liable for the entire injury. *Northup* v. *Eakes* (Okla. 1918, 1919) 178 Pac. 266; *Slater* v. *Mesereau* (1876) 64 N. Y. 138. But at least when the bailee is a carrier, the minority doctrine seems to govern in New York. *Arctic Fire Ins. Co.* v. *Austin* (1877) 69 N. Y. 470. To escape the conclusion reached by this author-